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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May a dealer termination case go to the jury on a price-fixing charge when there is: undisputed evidence of the termination's procompetitive benefits; no direct evidence of an understanding concerning price; and, at most (according to the Court of Appeals), only "weak" circumstantial evidence from which a price understanding might be inferred?

2. In holding that such a case must go to the jury, does the decision below depart from the standards established in *Monsanto Company* v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (March 20, 1984), and frustrate the economic objectives which this Court sought to promote in *Monsanto*?

3. If such a case can go to the jury, should the rule of reason, rather than the *per se* rule, be applied?

LIST OF PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Ninth Circuit are those listed in the caption of this Petition and Mazel Corporation and Copper State Distributors, Inc. The Buckingham Corporation is a wholly owned subsidiary of Beatrice Worldwide, Inc., which in turn is owned by Beatrice Companies, Inc. and Beatrice Beverage Holding Co.*

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* A list of The Buckingham Corporation's affiliates is annexed as Appendix A.

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THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, The Buckingham Corporation ("Buckingham"), asks that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, entered in this case on August 7, 1984.

This case is already familiar to the Court. On April 2, 1984, this Court granted Buckingham's petition for a writ of certiorari to review a 1983 order of the Ninth Circuit which held that a terminated dealer's evidence at trial was "weak" but sufficient to go to a jury. The judgment below was vacated and the case remanded for reconsideration in light of *Monsanto*

Company v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (March 20, 1984). Rather than reassess the evidence under the newly articulated standard in *Monsanto*, the court below—over the dissent of Judge Poole—merely reinstated its initial memorandum disposition of the case. In so doing, the Court of Appeals not only failed to follow *Monsanto*, but also undermined the important economic objective of that decision—to prevent the threat of treble damage liability, based on weak evidence of vertical price communications, from inhibiting procompetitive dealer terminations.

Opinions Below

The August 1984 decision and order of the Court of Appeals (the "1984 Order"), not officially reported, is annexed as Appendix B. The earlier memorandum opinion of the Court of Appeals, dated February 25, 1983 (the "1983 Opinion"), not officially reported, is annexed as Appendix C. The portions of the transcript of proceedings containing the oral opinion of the United States District Court for the District of Arizona (Hardy, J.) are annexed as Appendix D. The judgment of the District Court is annexed as Appendix E.

Jurisdiction

The judgment of the Court of Appeals was entered on August 7, 1984. A timely Petition for Reconsideration or Rehearing with a Suggestion of Rehearing *En Banc* was denied on September 28, 1984. This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. §§ 15 and 26, 28 U.S.C. §§ 1331, 2201 and 2202, and the doctrine of pendent jurisdiction, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Statute Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

The Parties

Buckingham is the United States importer of several brands of wines and spirits, the most important of which is Cutty Sark Scotch Whisky. For many years prior to August 1981, Buckingham distributed its products in Arizona through two wholesalers, Arizona Distributing Company ("ADC") and Copper State Distributors, Inc. ("Copper State").

Buckingham's Choice of Copper State as its Exclusive Distributor

Buckingham's practice of selling its products through two wholesalers put Buckingham at a distinct disadvantage in the highly competitive Arizona market where virtually all wines and liquors were sold through exclusive wholesalers. ADC's president, Braddock, acknowledged this fact in a letter to Buckingham in March 1980:

> "I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor. * * * I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we

were the exclusive distributor. * * * . . . [O]ur state is not a healthy environment for dual merchandise. . . ."[1]

During the summer of 1980, Buckingham brought in new management in an attempt to revive the floundering Cutty Sark brand. The new management began to evaluate and compare the two Arizona wholesalers in January 1981 in order to select one as exclusive distributor. Several factors led to the conclusion that ADC lacked commitment to Buckingham's brands and that Copper State was more willing to promote them.

First, Copper State won a contest to become Buckingham's exclusive wine distributor in Arizona. It won because it sold far more wine than ADC during the 3-month contest period.

Second, Copper State's comparative sales performance figures were consistently higher than ADC's, apart from a brief and temporary leap in ADC's sales caused by an unprecedented 10-day discount in April 1981. Usually Copper State's prices were lower than ADC's.

Third, Buckingham learned that ADC's president had testified in December 1980 in another action that he considered Cutty Sark an unprofitable but "necessary evil" that he would get rid of when he could obtain another prestige Scotch to replace it.

Finally, Copper State's chief executive, Gellerman, had persistently displayed his commitment to promoting the Buckingham brands.

On August 6, 1981, Buckingham made the only choice it could to improve its competitive position in the Arizona market—it terminated ADC.

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1 The full text of Braddock's letter is annexed as Appendix F.

Proceedings Below

The District Court

ADC claimed in the District Court that its termination was the result of a conspiracy between Buckingham and Copper State to fix prices. Its claim was based entirely upon a handful of innocuous communications during the 10 days in April 1981 when ADC's unprecedented discount occurred. At the most, there was a complaint by Gellerman and a few communications between Buckingham and the two distributors in an effort to resolve the confusion caused by the unprecedented price cut.

There was no evidence that Buckingham in any way suggested the actual price charged by ADC or Copper State for Buckingham's brands.[2] There was no evidence that Gellerman and Buckingham ever discussed future prices or that Buckingham made any requests concerning prices. Nor was anything said in meetings between Braddock and Buckingham personnel from which a threat of termination could be implied.

ADC also relied on a memorandum written on April 29, 1981, by Ken Ahlburg, Buckingham's Western Division Manager, to Buckingham's Senior Vice President of Sales outlining his reasons for recommending Copper State as exclusive distributor.[3] While the memorandum discusses the April discount—among other factors unrelated to pricing—nothing in it suggests coercion or a pricing agreement.

At the close of ADC's case, the District Court, concluding that "there is no evidence to show that these parties acted in

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2 The net wholesale price is the price listed by the wholesaler, minus a discount dependent upon the number of cases purchased. Buckingham suggested list prices for its products, but it never suggested discounts for Cutty Sark or its wines sold in Arizona.

3 The full text of the Ahlburg memorandum is annexed as Appendix G.

concert . . .," directed a verdict dismissing ADC's price fixing claims. The court observed that if this type of evidence could support an antitrust violation, Buckingham would be "in a Catch 22 situation." If ADC could get to a jury because of Copper State's complaints about its discount, Copper State could also get to a jury if it were terminated; it could argue that, because of its consistently lower prices, which displeased Braddock, ADC was chosen as the exclusive distributor. (App. D, p. 17a) Buckingham might then be forced to choose the anticompetitive alternative of keeping both wholesalers rather than risk a treble damages judgment.

The Court of Appeals' First Decision

Ignoring Buckingham's dilemma, the Court of Appeals reversed. It conceded that ADC's evidence was "weak," but held that "there was sufficient circumstantial evidence to withstand the motion for a directed verdict." (App. C, p. 11a) It did not specify the standard it had applied in reaching this conclusion. The Court cited two pieces of evidence which it considered sufficient to take the case to the jury: (1) the "Ahlburg Memorandum" (App. G)—even though it contained no suggestion of an agreement, and (2) Gellerman's offer at a meeting with Ahlburg to make a "commitment" in exchange for the exclusive distributorship—even though Gellerman made no mention of price.[4]

While relying on evidence which bore absolutely no relation to price fixing, the Court of Appeals ignored the most telling piece of evidence in the case—the Braddock letter in which ADC's president admitted that it would be in Buckingham's competitive self-interest to terminate one of its wholesalers. Apparently, the Court believed that evidence of procompetitive benefits was not pertinent to determining whether there was sufficient evidence of a conspiracy to fix prices.

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4 The full trial testimony concerning this "commitment" is annexed as Appendix H.

The Court of Appeals' Decision after *Monsanto*

Buckingham petitioned this Court for a writ of certiorari to review the 1983 Opinion, pointing out that this case would assist the Court in resolving definitively the questions presented in *Monsanto*, then pending before the Court.

Two weeks after the decision in *Monsanto*, this Court granted Buckingham's petition, vacated the judgment of the Ninth Circuit and remanded the case for reconsideration in light of *Monsanto*. Costs were awarded to Buckingham.[5]

On remand, the Court of Appeals—over the dissent of Judge Poole—simply reinstated its initial memorandum disposition of the case. Rather than reassess the evidence under the newly articulated standard in *Monsanto*, the Court stated that its prior order had already applied that test. Judge Poole, who did address the evidence considered in the 1983 Opinion, found:

> Though before *Monsanto* such evidence may have been thought sufficient to withstand a directed verdict, I believe the Supreme Court's most recent decision requires more. (App. B, p. 9a)

The panel denied Buckingham's petition for rehearing.

REASONS FOR GRANTING THE WRIT

We are not asking this Court to review a decision that merely raises the question of whether a recently enunciated standard has been correctly applied. A good deal more is involved here.

First, the Court of Appeals, in reinstating on remand its vacated disposition of the case, disregarded this Court's mandate to reconsider the evidence below in light of *Monsanto*. The 1983 Opinion totally ignored undisputed evidence that it

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5 This Court's order, reported at 104 S. Ct. 1699 (April 2, 1984), is annexed as Appendix I.

was in Buckingham's competitive self-interest to terminate one of its distributors—to use an exclusive distributor as all of its competitors did. The Court of Appeals plainly could not have applied the test announced in *Monsanto* that for a case to get to a jury "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 104 S. Ct. at 1471.[6]

Moreover—and more important—the Court of Appeals' decision undermines the important economic objective this Court sought to achieve in *Monsanto*. The rigorous standards set forth in *Monsanto* for inferring a vertical price-fixing conspiracy were expressly designed to allow a supplier to make an efficient change in its distribution system without undue risk of treble damage exposure. The decision below thwarts that purpose. No matter what *Monsanto* may say, suppliers who have discussed prices with dealers (which *Monsanto* permits), or who have received complaints about price cutters (which *Monsanto* recognizes as inevitable), will have cause to fear treble damage judgments in favor of terminated dealers if evidence as meager as that introduced here must be presented to a jury. The result will be that many inefficient distribution systems will remain unchanged because such suppliers are likely to follow the conservative—but non-competitive—course of maintaining the status quo.

This Court should now grant review not only to correct the error of the Court of Appeals, but also to insure that the objectives of *Monsanto* are achieved in the real world.

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6 This Court has granted certiorari twice in the same case to review a lower court decision after remand in order to insure that a recent decision of this Court was correctly followed. *See, e.g., Schlude* v. *Commissioner of Internal Revenue*, 372 U.S. 128, 129-30 (1963).

I.

The Ninth Circuit's Decision Conflicts Directly with *Monsanto*

The Court of Appeals' 1983 Opinion concluded that ADC's evidence, although "weak," was sufficient to take the case to a jury. The Circuit Court did not, however, define the standard for inferring a price-fixing conspiracy which it had applied. The 1984 Order merely stated in retrospect that the 1983 Opinion had followed the same test that was subsequently enunciated in *Monsanto*. But the evidence in the case—and the reasoning of the Ninth Circuit itself—demonstrates that the decisions below directly conflict with *Monsanto*.

In *Monsanto*, this Court rejected the rule previously adopted by the Ninth Circuit[7] that a price-fixing agreement may be inferred "from the fact that termination came about 'in response to' complaints." 104 S. Ct. at 1470. Instead, expressly recognizing the anticompetitive consequences of inferring concerted action from "highly ambiguous evidence," this Court announced a new standard: "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 104 S. Ct. at 1471. The undisputed evidence in *Buckingham* demonstrates conclusively that Buckingham had independent procompetitive reasons for terminating ADC. The Ninth Circuit therefore could not have followed the *Monsanto* standard.

The 1983 Opinion itself recognized that Buckingham had "presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price." (App. C, p. 11a) This evidence included: the desire of Buckingham's new management to upgrade the Cutty Sark image; Copper State's victory in the wine contest; Copper State's comparative sales performance figures; the hostility

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7 *See Filco* v. *Amana Refrigeration, Inc.*, 709 F.2d 1257 (9th Cir.), *cert. dismissed*, 104 S. Ct. 385 (1983).

against Buckingham shown in the testimony of ADC's president in another action; and Gellerman's display of commitment to promoting the Buckingham brands. (App. C, p. 11a)

Moreover, the Ninth Circuit ignored entirely the most probative piece of evidence on the conspiracy issue: the letter from ADC's president which admitted that the existing distribution system for Buckingham's products in Arizona—*i.e.*, two wholesalers serving the same geographical market—was inefficient and that Buckingham had a competitive need to terminate one of its wholesalers. (App. F) The Court of Appeals' failure even to consider this critical piece of evidence reveals that the court believed—erroneously—that evidence of procompetitive benefits was not pertinent to determining whether there was sufficient evidence of a price-fixing conspiracy. The Circuit Court's decision that a conspiracy may be inferred in the face of undisputed evidence that a termination was in the supplier's competitive self-interest squarely conflicts with *Monsanto*.

This Court should not allow such disregard of the standard which it has mandated for inferring a vertical price-fixing conspiracy and which it specifically ordered the Court of Appeals to apply in this case.

II.

The Decision Below Frustrates the Economic Objectives *Monsanto* Sought to Achieve

The central aim of the *Monsanto* decision was to give suppliers the freedom to make their distribution systems operate more efficiently. To this end, the Court sought to establish a clear and relatively stringent standard that would not subject a supplier to the risk of jury-imposed treble damages based on "highly ambiguous" evidence of pricing decisions by the supplier and routine price communications between it and its dealers. 104 S. Ct. at 1470. This Court recognized that treble damage exposure inhibits suppliers from

making their distribution systems more competitive—a result precisely the opposite of what the antitrust laws are designed to achieve. By permitting admittedly "weak" evidence of a price-fixing agreement to be presented to a jury, in the face of uncontradicted evidence of the termination's procompetitive benefits, the *Buckingham* decision creates the very inhibitions *Monsanto* sought to erase.

A lenient standard for inferring a price-fixing conspiracy in vertical cases may deter or penalize procompetitive conduct in two ways. First, an easy transition from communications between suppliers and wholesalers to *per se* illegality will chill necessary dialogue. In this Court's words,

> "A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. . . . [I]n order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market." 104 S. Ct. at 1470.

Accord Roesch, Inc. v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *aff'd*, 712 F.2d 1235 (8th Cir. 1983) (*en banc*), *cert. denied*, 104 S. Ct. 1707 (1984).

Second, with the threat of treble damages hanging over its head, a supplier will frequently dare not risk making its distribution system more competitive. It is well recognized that "[c]ompetition is promoted when manufacturers are given wide latitude in establishing their method of distribution and in choosing particular distributors." *A.H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1306 (9th Cir. 1981); *see Monsanto*, 104 S. Ct. at 1470; *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977). Yet suppliers must make decisions in the real world. Before a supplier can make an efficient change in its distribution system, including ceasing

sales to a particular distributor, it must address the practical question of whether as a consequence of price discussions the terminated distributor may be able to get a price-fixing claim before a jury. If the answer to this question is "yes"—or even "maybe"—the supplier is likely to forego a procompetitive change in its method of distribution.

Thus, this Court stressed in *Monsanto* that

> ". . . it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to *per se* treatment and treble damages. . . . If an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded." 104 S. Ct. at 1470.

Exposing a supplier to treble damage liability "could deter or penalize perfectly legitimate conduct." *Id. Accord Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 13 (1981).

The decision below puts Buckingham in an insoluble predicament. Both Copper State and ADC had engaged in at least some price cutting—ADC for 10 days in April 1981 and Copper State consistently over several years. In each case, the higher priced wholesaler complained. Thus, either Copper State or ADC would have been able to argue that it was terminated as a result of its price-cutting efforts and the supplier's communications with the other wholesaler. Since the Court of Appeals held that there was enough evidence to infer a price-fixing agreement, despite the undisputed evidence that Buckingham was at a competitive disadvantage because it did not have an exclusive wholesaler, Buckingham's only safe

option is the anticompetitive one—terminate neither distributor and perpetuate the inefficient *status quo*.

If the Ninth Circuit's decision is allowed to stand, many suppliers will face the same dilemma as Buckingham—the very dilemma *Monsanto* was intended to resolve. This Court should grant certiorari to ensure that the economic objective underlying its decision in *Monsanto* is not thwarted in this way.

III.

The Rule of Reason, Rather Than the *Per Se* Rule, Should Be Applied In Any Trial

If there is to be another trial, we urge this Court to direct that the rule of reason, rather than the *per se* rule, be applied in determining whether there was any antitrust violation.[8]

The decision below demonstrates the adverse economic consequences of applying a lenient and imprecise standard for inferring a price-fixing conspiracy in a vertical context. This anticompetitive impact will be compounded if, once a conspiracy is inferred, the *per se* rule comes into play. The conjunction of an easy inferrence of concerted action with the *per se* rule permits a doubly drastic result in cases like this—the leap from routine price communications between a supplier and its wholesalers to treble damage exposure, without any opportunity for the supplier to show that its price communications were reasonable. If procompetitive conduct may be the basis for conclusively finding an illegal conspiracy under the *per se* rule, the inhibitions that *Monsanto* sought to alleviate will be intensified.

It has become increasingly well recognized in recent years that, since resale price maintenance is frequently procompeti-

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8 Buckingham argued in its initial petition for certiorari, as well as in the district court, that its termination of ADC should be evaluated under the rule of reason. In *Monsanto*, this issue was not raised below. 104 S. Ct. at 1469-70 n.7.

tive, the *per se* rule should not apply to vertical price restrictions.[9] Where horizontal price communications are at issue, it is consistent with antitrust policy to combine a lenient standard for inferring concerted action with the *per se* rule since such communications are rarely legitimate. *E.g.*, *United States* v. *Container Corporation of America*, 393 U.S. 333, 337 (1969). But, as this Court noted in *Monsanto*, this is not so in vertical cases. Unlike horizontal communications, dialogue between suppliers and wholesalers is necessary to maintain efficient systems of distribution. Conduct which economic and judicial experience has shown does not invariably have a "pernicious effect on competition" or lack "any redeeming [competitive]

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9 Prominent commentators, as well as senior Justice Department and Federal Trade commission officials, have critized the rule in *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911). *See* Scherer, *The Economics of Vertical Restraints*, 52 Antitrust L.J. 687 (1983); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 8-14 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373 (1966); Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 15-8, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.); *Attorney General William French Smith's Remarks to District of Columbia Bar*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1021, H-1, at H-2 (July 2, 1981); *Justice Drops Vertical Price Fixing, Mergers Cases Begun Within Last Year*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1022, A-7, at A-8 (July 9, 1981) (William Baxter, Assistant Attorney General, Antitrust Division); *Vertical Restraints Can Increase Consumer Welfare: Antitrust Official*, Trade Reg. Rep. (CCH) slip no. 516, 4 (November 16, 1981) (Ronald Carr, Deputy Attorney General Antitrust Division); Schwartz & Eisenstadt, *Vertical Restraints* 31-50 (Antitrust Division Economic Policy Office Discussion Paper 1982); *New England Conference Probes Trends in Antitrust Enforcement*, 47 Antitrust & Trade Reg. Rep. (BNA) slip no. 1189, 848, at 849 (Nov. 8, 1984) (Terry Calvini, Commissioner, Federal Trade Commission); *Interview with Thomas J. Campbell, Director of Bureau of Competition*, 43 Antitrust & Trade Reg. Rep. (BNA) slip no. 1074, 238 (July 22, 1982);

virtue," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*, 433 U.S. at 49-50, should not be condemned as *per se* unlawful—particularly where evidence of a conspiracy is as ambiguous as that below.[10]

In light of the undisputed procompetitive benefits of the termination here, we submit that this case provides an ideal and important opportunity for the Court to consider the interconnection between the rule of *Dr. Miles* and the standard for inferring a vertical price-fixing agreement.

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10 Brief for the United States as Amicus Curiae in *Monsanto*, *supra*, at 16; *accord Broadcast Music, Inc.* v. *C.B.S.*, 441 U.S. 1, 19-20 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688, 692 (1978); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

Conclusion

For the foregoing reasons, we ask the Court to grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: November 16, 1984

Respectfully submitted,

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APPENDICES

APPENDIX A

Listing Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States

The Buckingham Corporation Affiliates*

International Genetic Engineering, Inc.
Poultry Foods Industries, Inc.
Rusty Jones, Inc.
Webcraft Technologies, Inc.
Abella E. Hijos
Adam Titz Vert, GMBH & Co Kg
Adam Titz Vertriebs GMBH
Ailiram S.A. Productos Alimentic
Al Rostamani Beatrice Middle East
Althentarios Y Tecnia S.A. De C.
Alimentos Futura S.A.
Altro S.A. De C.V.
Anchor Japan Co. Ltd.
Artigel GMBH
Artigel GMBH & Co. Kg
Australian Freezers Pty. Ltd.
Baron's Table Specialty Meats Pt.
Beans (Hong Kong) Ltd.
Beatrice Disc Inc.
Beatrice Foods (Ontario) Ltd.
Beatrice Foods (S) Pte. Ltd.
Beatrice Foods (U.K.) Ltd.
Beatrice Foods Co. & Dr. Suwelac
Beatrice Foods Finance (Europe)
Beatrice Foods S.D.N. Berhard
Bebidas Savoy C.A.

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* Each of the companies listed in this appendix is a subsidiary of Beatrice Companies, Inc., the parent company of The Buckingham Corporation. Wholly-owned subsidiaries of Beatrice Companies, Inc. are not listed.

Bireley's Calif Orange (Thail)
Boquitas Fiestas S.A. De C.V.
Caramelos Royal S.A.
Charles Candy Co Ltd.
Chocolates S.A. De C.V.
Choky S.A.
City Centre Cold Stores Pty. Ltd.
Comelco N.V.
Comelco S.V. M.S.C.
Consevera Campofrio S.A.
Creme Glacee Cyriel N.V.
Cremo Ltd.
Culligan Flandres
Culligan Italiana S.P.A.
Culligan Lorraine
Culligan Teko A.B.
Culligan Val De Lorie
Dairy Brix Manufacturing Limited
De Forenede Isvaerker A/S Esbjer
Delite Foods Co. Ltd.
Dietetic Products GMBH
Dietetic Products GMBH & Co. Kg
Distribudora Marsanita C.A.
Distributdora Holanda Del Noroes
Ecudal Ecutoriana De Alimentos
Elnagh S.P.A.
Empac S.A.
Empacadora Pepes S.A. De C.V.
Establissements Baud S.A.
Establissements Boizet
Europe Strength Food Co Pty Ltd.
Finance Corporation of Jamaica
Food Producers Europe B.V.
Food Producers Japan Ltd.
Gecoma S.C.S.
Gelati Sanson S.P.A.
Goodwill Bottling Ltd.

Goodwill Bottling North Ltd.
Granos de Oriente, C.A.
Griffiths Laboratories (HK) Ltd.
Guangmei Foods Corp.
H.B. Sohne GMBH & Co Kg
Harman Automotive GMBH
Harman France S.A.
Helados Canarios S.A.
Holanda S.A. De C.V.
Industrias Abella
Industrias Benco C.A.
Industrias Savoy C.A.
Interglas S.A.
Internacional De Alimentacion
Jack's Amazonia-Ind. De Alimento
Jacobi-Scherb, GMBH & Co Kg
K-S-K Tech, Betrieb, GMBH
Kaasmakerij Passendale N.V.
Kasei Fiberite Co. Ltd.
Ksk Tech, Betrieb, GMBH & Co Kg
L.T.M.
Lacsoons N.V.
Nanassen Lucchitti Co Pty Ltd.
Minimarche Essone
Minimarche Hauts De Seine
Minimarche Marne
Minimarche Paris
Minimarche Seine Et Marne
Minimarche Seine St. Denis
Minimarche Val D'Oise
Minimarche Val De Marne
Minimarche Yvelines
Modernas Appl. De La Refr. Indus.
Nergico S.A.
Olischlager N.V.
Pader, Kuh, GMBH & Co Kg
Paderborner Kuh, Beteil, GMBH

Paris Libre Service
Patra Foods (N.Z. Ltd.
Premier Milk (Malaya) Sdn Bhd
Premier Milk (Sing) Pte Ltd.
Productos Alimenticios Rene S.A.
Productos Chipy S.A.
Quimica Stahl Polyvinyl C.A.
Red Tulip Chocolates Pty Ltd.
S.A. Choky
S.A.I.P.A.
Samsonite N.V.
Schwab, Kons, Vert. GMBH
Schwikkard GMBH & Co Kg
Sedipro S.A.
Serco Lubricantes Metalicos S.A.
Smith Kendon Ltd.
Soc Moulin De Chennevieres
Soc. De Gest. De Supermarches
Socadip S.A.
Societe Europeene De Supermarche
Stahl Chemical Asia Pte. Ltd.
Stahl-Asia Trading Pte. Ltd.
Ste. Marie N.V.
Stute Bautrager GMBH & Co Kg
Stute Geschafts, GMBH
Stute GMBH & Co Kg
Stute Kons, GMBH & Co Kg
Stute Konserven GMBH
Stute Nahrung, GMBH & Co Kg
Stute Verwaltungs GMBH
Sunco N.V.
Superette Ile De France
Superette Paris
Superette Seine Et Marne
Superette Seine St. Denis
Superette Yvelines
Tayto Ltd.

Ten Doesschate B. V.
Tendo Haco Farmacie B.V.
Thur. Art. Schindler GMBH & Co
Topland Foods Company (Nigeria)
Tribol S.A.
Unicorp Pty Ltd.
Unigate Pte. Ltd.
Van Camp Chocolates Ltd.
W. J. Dwan & Sons Ltd.
W.L. Ahrens GMGH & Co Kg
Waipat Juices Pty Ltd.
West, Nahrung, Prod. GMBH
Wilh, Kirberg GMBH & Co Kg
Winner Food Products Ltd.
Winston Noodle Products Ltd.
Haifa Chemicals, Ltd.
Incitec, Ltd.
Yong Nam Chemical Company, Ltd.
Swift Independent Corporation
Grupo Industrial PEMSA, S.A. de C.V.
Grupo Industrial PEMSA, S.A. de C.V.
Indel Electrical Supply Corporation
FujiCone, Inc.
Fabricacion y Distribucion de Productos, S. de R.L.
Double-S Poultry Ltd.
Meatpak Hampshire Limited
Avis Car Leasing Limited
Chaconne Pty. Limited
Intercar Tourist Enterprises SA
International Car Rental B.V.
Kenya Rent A Car Ltd.
Locadif S.A.
Olympic Commercial & Tourist Enterprises, SA
Olympic-Crete Commercial & Tourist Enterprises
Manessi Bros.-Olympic Commercial & Tourist Enterprises Ltd.
Sovial Sociedade de Viaturas de Alugar Lda.

Sogen-Avis
Tourism Promotion Services (Kenya) Ltd.
West Indies Car Rental Limited
Algo, S.A. de C.V.
National Car Rentals (Private) Limited
Sistem Sewa Kereta Malaysia Sdn. Bhd.
Mutual Rental Cars (Fiji) Limited
Mutual Rental Holdings, Limited
Norton Simon Canada, Inc.
American Cosmetics Kabushiki Kaisha
Norton Simon Canada, Inc.
Riviera S.R.L.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-6046, 82-5241

BUCKINGHAM CORPORATION, a Delaware Corporation,

Plaintiff,

—v.—

ODOM CORPORATION, a Delaware Corporation, dba ARIZONA DISTRIBUTING COMPANY,

Defendant,

ODOM CORPORATION, dba Arizona Distributing Company,

Counterclaimant-Appellant,

—v.—

BUCKINGHAM CORPORATION; MAZEL CORPORATION, an Arizona Corporation; COPPER STATE DISTRIBUTORS, INC., an Arizona Corporation,

Counterdefendants-Appellees.

Before:

POOLE and BOOCHEVER, *Circuit Judges*, and MCNICHOLS,* *District Judge.*

ORDER

The initial memorandum disposition in this case is reinstated. We applied the same test as required by *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S. Ct. 1464 (1984), namely, that there be sufficient evidence to overcome a

* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

motion for a directed verdict on the question of whether there was a common scheme (an agreement between Buckingham and Copper State) designed to achieve price control, and that Odom was terminated as a result. "[T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." *Id.* at 1471. The district court should apply the specific standard announced in *Monsanto* when instructing the jury on the standard of proof.

POOLE, *Circuit Judge*:

I respectfully dissent.

Reconsidering this case in light of *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984), appellant's evidence falls short of the standards announced by the Supreme Court.

Though given an opportunity at trial to present all its available evidence before appellee's motion for directed verdict, appellant has failed to show the "concerted action" required under *Monsanto*. The Supreme Court in that case was quite clear that the concerted action necessary to establish an antitrust violation should not be lightly assumed to exist. Price fixing agreements, the Court warned, should not be inferred from "highly ambiguous evidence." 104 S.Ct. at 1470.

In our prior disposition, we recognized that Buckingham had shown legitimate, independent business reasons for terminating Odom. As a competitor, Copper State, too, had obvious reasons to wish for Odom's termination. The evidence presented is perfectly consistent with the view that Buckingham and Copper State were each acting on their own. But under the standards announced in *Monsanto*, Odom's termination cannot support antitrust liability unless there is "evidence that *tends to exclude the possibility* that the manufacturer and non-terminated distributors were acting independently." 104 S.Ct. at 1471.

Here, there is no such evidence. The Ahlburg Memorandum, on which appellant chiefly relies, is not so sinister as appellant pretends. Even read in the light most favorable to the terminated distributor, this document does not show a price fixing agreement between Buckingham and Copper State. Ahlburg's casual reference to communications with Copper State employees will not support a finding that Odom's subsequent termination was the result of an agreement with the competing distributor. As the Court in *Monsanto* recognized, "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market." 104 S.Ct. 1470. Moreover, it noted, "complaints about price-cutters 'are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals.' " *Id.* This communication between Ahlburg and Copper State does not make out a showing of concerted activity.

The professed willingness of Copper State's president to make a "commitment" to the Cutty Sark brand and to "work" to promote it, is equally innocuous. In the exercise of its own business judgment, Buckingham was entitled to choose the wholesaler whom it believed would best promote its brands, and the antitrust laws do not prohibit that choice. Nothing in the reported conversations between Ahlberg and Copper State indicates an agreement to fix prices or otherwise shows a "conscious commitment to a common scheme to achieve an unlawful objective." 104 S.Ct. at 1473.

At best, appellant's evidence is "highly ambiguous," amounting to a temporal coincidence between its own termination and complaints from a competing distributor. Though before *Monsanto* such evidence may have been thought sufficient to withstand a directed verdict, I believe the Supreme Court's recent decision requires more. Consequently, I would affirm the district court.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-6046, 82-5241

D.C. No. CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
dba ARIZONA DISTRIBUTING COMPANY,

Defendant,

THE ODOM CORPORATION,
dba ARIZONA DISTRIBUTING COMPANY,

Counterclaimant/Appellant,

—v.—

THE BUCKINGHAM CORPORATION; MAZEL CORPORATION,
an Arizona corporation; COPPER STATE DISTRIBUTORS,
INC., an Arizona corporation,

Counterdefendants/Appellees.

MEMORANDUM

Argued and Submitted—October 15, 1982
Decided—February 25, 1983

Appeal from the United States District Court
for the District of Arizona
Honorable Charles L. Hardy, District Judge, Presiding

Before: POOLE and BOOCHEVER, *Circuit Judges,*
and MCNICHOLS,* *Senior District Judge.*

Buckingham sued Odom for a declaratory judgment that its termination of Odom as a liquor distributor was lawful under the Sherman Act. The district court granted a directed verdict for Buckingham but denied it attorney's fees for defending various state law claims brought by Odom. Both sides appeal.

Although Odom's evidence was weak, there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict. Arizona law may provide for attorney's fees in cases such as this. We therefore reverse and remand.

In this case, the standard of review is critical. In considering a motion for directed verdict, the controlling inquiry is whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party (i.e., Odom). *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977). The evidence is viewed in the light most favorable to the nonmoving party. *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the "Ceccarelli" testimony, and the Finlandia discount.

Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the "Ahlburg Memorandum" which focused on the pricing reasons for the termination, and Gellerman's offer to make a "commitment" in exchange for an exclusive distrib-

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* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

utorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a directed verdict.

Odom brought a counterclaim based on the Arizona Spirituous Liquor Franchises Act, Ariz. Rev. Stat. Ann. §§ 44-1565-44-1567 (West Supp. 1982), which it later abandoned. Section 44-1567 makes an award of attorney's fees to the "prevailing party" mandatory. Thus, if Buckingham prevailed, it was error for the district court not to award attorney's fees on the Franchise Act claim. But it is not clear whether to be a "prevailing party" under Arizona law it is enough that the party prevailed on the Franchise Act claim alone, rather than in the case as a whole. The district court should initially decide this issue of Arizona law. Since it is necessary to remand for a new trial, determination of whether to make an award of attorney's fees and, if one is made, the reasonable amount, must await the outcome.

Odom also brought a counterclaim based on a theory of implied contract. Ariz. Rev. Stat. Ann. § 12-341.01(A) (West 1982) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." Buckingham was granted a directed verdict on the implied contract action.

Section 12-341.01 has a stated purpose of "mitigat[ing] the burden of the expense of litigation to establish a just claim or a just defense." Ariz. Rev. Stat. Ann. § 12-341.01(B); *Shirley v. Hartford Accident & Indemnity Co.*, 125 Ariz. 70, 607 P.2d 389, 390 (Ct. App. 1979). Therefore, in the light of the remedial nature of the statute, *Nationwide Mutual Insurance Co. v. Granillo*, 117 Ariz. 389, 573 P.2d 80, 86 (Ct. App. 1977), the court may have abused its discretion in not granting attorney's fees.

Again, it is not clear whether to be "successful" Buckingham must succeed in the case as a whole or if it is enough to succeed on the implied contract claim alone. At the conclusion of the trial, the district court should determine this issue.

Section 12-341.01(B) expressly states that reasonable attorney's fees need not equal or relate to actual attorney's fees. Therefore, if the district court awards attorney's fees on the implied contract claim, it must determine what amount would be reasonable.

REVERSED and REMANDED.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

Before: THE HONORABLE CHARLES L. HARDY
Judge of the United States District Court

APPEARANCES:

For the Plaintiff:
Mr. Jay Greenfield
Mr. Richard D. Friedman
Attorneys at Law

For the Defendant:
Mr. Daniel S. Mason
Mr. Craig Corbitt
Attorneys at Law

For Mazel Corp. and
Copper State Distributing
Mr. Daniel J. McAuliffe
Attorney at Law

November 24, 1981
Phoenix, Arizona
A. M. Session

[807]*

IN OPEN COURT (NO JURY PRESENT)

PROCEEDINGS

THE COURT: Yesterday I had my secretary call you and tell you that I was proposing to deny the motion on the counter-defendants, Buckingham and Copper State, on the antitrust claims, grant it on the implied contract claim. I really have now concluded I ought to direct a verdict on the antitrust claims.

I'd like to try to articulate my reasons. We start out with the proposition that everybody agrees here that there should only be one Cutty Sark distributor in Arizona. And the evidence seems to be undisputed when the new management took over Buckingham in late 1980 they became cognizant of the desirability of having one distributor but decided because they did not know either ADC or Copper State to wait and observe how these two companies operated.

I believe Mr. Alburg testified that even before April he was beginning to lean towards Copper State. And then in April we have the—I use the term "famous discount" by ADC, which it can be said, I think, that Mr. Gellerman complained to both Mr. Lichtenberger—well, initially to Mr. Lichtenberger then later talked to Mr. Alburg about it. While it's disputed, said, "What are you going to do about it?"

[808]

Mr. Alburg told him that he would propose to recommend that Copper State become the exclusive distributor. That was on the 28th of April. And on the 29th, after Mr. Alburg had returned to his office in Los Angeles, he talked to Mr. Karp in New York. He told him of his conversations with Mr. Braddock and Mr. Gellerman, and then wrote the memorandum, which is Exhibit 101, in which he recommended that Copper State handle the complete line on an exclusive basis.

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* Bracketed numbers refer to pages in the Reporter's Transcript of Proceedings.

I need to back up a little. On the 28th when Mr. Alburg was in Phoenix he told Mr. Braddock that Buckingham disapproved of these so-called deep discounts. And again there is a dispute in the testimony. He told him that Buckingham would like to have a voice in the programming of the sales of Cutty Sark.

There was apparently some evidence the word "program" was not used, but the discounts, or the prices, I'm not quite sure.

In any event, whatever was said, I can't find that what Mr. Alburg said to Mr. Braddock was coercive. And then, frankly, I can't find anything in the evidence from which to support a finding that Mr. Gellerman agreed that if he had the exclusive he would follow Buckingham's suggestions as to prices to be placed on the Buckingham products.

Then, what is really compelling to me, is this: If we could find an understanding between Alburg and Gellerman that [809] if he would get the exclusive distributorship then Gellerman would agree to follow Buckingham's price suggestions, if we could find that kind of an agreement—I can't see how that is an agreement of Buckingham's, because Alburg has no authority to make that agreement, the decision as to who is to be the exclusive distributor is Mr. Karp's decision, and I just don't see how he made a decision—how his decision in August was the product of any agreement on his part to give the exclusive distributorship to Gellerman, or to Copper State if Copper State would maintain its prices in accordance with Buckingham's suggestions.

Furthermore, there are a lot of cases which say that a supplier can always terminate his distributor provided that the reason, whether it's the sole reason or overriding reason or substantial reason, is not an anti-competitive one. But I suspect that in many of those cases they are cases where the suppliers are in a truly competitive market; for example, a Texaco station which for one reason or another starts undercutting, you know, selling at a lower price than all the other Texaco dealers in town, and is terminated for that reason. But here everybody agrees that there should only be one distribu-

tor. And, really, Buckingham is in a Catch 22 situation. If they give it to ADC then Copper State complains that it's done because they were lower. And, by the way, we've got the same conversations, the same—well, not the complaints, but we've [810] got the urging from Mr. Braddock in behalf of ADC to Buckingham that Arizona is just not big enough for two, it can't get proper attention.

So, as I say, Buckingham is in a no-win situation in this case, and where everybody agrees that there should only be one distributor, and Buckingham decides to give it to Copper State, how—really, how can it be an anti-competitive decision, a decision to eliminate competition? How can it be a restraint of trade?

* * *

[888]

THE COURT: I'm going to grant the motion. I have come to the conclusion there is no evidence to show these parties acted in concert, and I'm going to grant the motion.

* * *

(Whereupon the jury is returned to the courtroom.)

THE COURT: Ladies and gentlemen, I've granted a motion for directed verdict which means that I have ruled that there is nothing to go to the jury in the case. That puts you out of a job.

In this case ADC had to show that Copper State and Buckingham acted together, what the law calls acting in concert to restrain trade, but I can't find any evidence to support that kind of conclusion. On that basis I have granted a motion for directed verdict.

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION, a Delaware corporation,

Plaintiff,

—vs.—

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Counterclaimant,

—vs.—

THE BUCKINGHAM CORPORATION, a Delaware corporation; MAZEL CORPORATION, an Arizona corporation; and COPPER STATE DISTRIBUTORS, INC., an Arizona corporation,

Counterdefendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Charles L. Hardy, United States District Judge, presiding, and the issues having been duly tried, and the Court having directed the verdict, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Motion for Directed Verdict of Plaintiff-Counterdefendant, The Buck-

ingham Corporation, and Counterdefendant Mazel Corporation, doing business as Copper State Distributors, Inc., is granted and that they take nothing by their counterclaim.

IT IS FURTHER ORDERED that Plaintiff-Counterdefendant have declaratory judgment against Defendant-Counterclaimant declaring that its termination of Defendant-Counterclaimant's franchise was not in violation of Arizona law.

Dated at Phoenix, Arizona this 10th day of December, 1981.

W.J. FURSTENAU, CLERK

By /S/ (Signature Illegible)
Deputy Clerk

Appendix F

(Letterhead of Arizona Distributing Company)

March 19, 1980

Mr. Robert Fine
The Buckingham Corporation
11777 San Vincente Blvd.
Suite 620
Los Angeles, CA. 90049

Dear Bob:

With the possible sale of Copperstate in the near future, it brings back to my mind our past conversation about dual items in the Arizona market. I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor.

If you would consider moving your entire line back to the Arizona Distributing Company I would personally assure you substantial increases in volume.

All the wines would be put on the "Arizona side" of the sales force and be handled by our chain division. I am confident that we could increase Mouton Cadet sales by 30 to 40 percent, the first year.

I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we were the exclusive distributor.

Bob, our state is not a healthy environment for dual merchandise and I am sure your sales figures would be impressive if you made the move to Arizona Distributing.

Many thanks for your consideration.

Sincerely

JACK

J.T. Braddock
President

jtb/les

Appendix G

MEMORANDUM

PERSONAL & CONFIDENTIAL

Date: April 29, 1981

Steve Karp
From: Ken Ahlburg

ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KEN

KA:hb

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

Before: THE HONORABLE CHARLES L. HARDY
Judge of the United States District Court

APPEARANCES:

For the Plaintiff:
Mr. Jay Greenfield
Mr. Richard D. Friedman
Attorneys at Law

For the Defendant:
Mr. Daniel S. Mason
Mr. Craig Corbitt
Attorneys at Law

For Mazel Corp. and
Copper State Distributing
Mr. Daniel J. McAuliffe
Attorney at Law

November 20, 1981
Phoenix, Arizona
A. M. Session

Testimony of Ken Ahlburg

[712]*

* * *

Q. How would you describe Mr. Gellerman's manner?

A. Well, his—

MR. MASON: Your Honor, I think we have all seen Mr. Gellerman's manner. I would object to that question.

THE COURT: Overruled.

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MR. FRIEDMAN: Thank you, Your Honor.

A. Mr. Gellerman one-on-one, particularly that evening, was an excellent sales person. I mean he showed a great deal—a great deal of emotion. I mean it was like, "I need this line, here's what I can do, I will make this kind of commitment, whatever it takes to build this brand I'm here to do it. I'll work." You know, just everything. And he discussed, you know, the fact that—he discussed what I mentioned earlier about the share of mind. He discussed the fact that he was using his computer network so he can monitor accounts in a more orderly fashion, we could get the information that we are not getting right now like accounts sold, and over—and the accounts what they sold last year versus this year. All of this information is really important when a salesman goes out to sell an account. A salesman walks in to an account, and if he knows last year during the holiday season he sold them say 100 cases and one ad, if a salesman has anything about him he's going to say, "You had one ad, you had 100 cases, why don't you put in two ads and let me sell you up to 200 cases." That's the purpose.

Q. You said Mr. Gellerman—

A. That's exactly what he was doing. I mean the buy was as emotional as I am right now. I'm sorry.

Q. Did you believe him?

A. What do you think? Yes, sir.

Q. Did Mr. Gellerman make any promises at that meeting

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* Bracketed numbers refer to pages in the Reporter's Transcript of Proceedings

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concerning his pricing of Cutty Sark?

A. No.

Q. Concerning his discounting of Cutty Sark?

A. No.

Q. Did you ask him for any commitments concerning pricing?

A. No.

Q. Concerning discounting?

A. No.

Appendix I

SUPREME COURT OF THE UNITED STATES

No. 82-1787

BUCKINGHAM CORPORATION,

Petitioner,

—v.—

ODOM CORPORATION, dba Arizona Distributing Company

Respondent.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Monsanto Company* v. *Spray-Rite Service Corporation*, 465 U.S. ____ (1984).

IT IS FURTHER ORDERED that the petitioner, Buckingham Corporation, recover from Odom Corporation, dba Arizona Distributing Company Two Hundred Dollars ($200.00) for its costs herein expended.

April 2, 1984

Clerk's costs: $200.00